# Supreme Court of the United States

OCTOBER TERM, 1936.

**No. 446.**

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATION,
PETITIONER,

VS.

EDWIN P. HAWORTH AND CORA M. HAWORTH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF OF RESPONDENTS.

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## BRIEF OF RESPONDENTS.

The petitioner as plaintiff filed a petition or bill in equity in the District Court of the United States for Western District of Missouri, Western Division, on January 5, 1935, naming the respondents here as defendants (Rec. 1). It describes five policies issued by it insuring the life of Edwin P. Haworth of Kansas City. Each contains a provision covering the event of the assured suffering dis-

ability. Four provide that provision is conditioned upon evidence of the continuance of the disability, and that the disability benefit shall cease upon recovery to an extent described. A copy of each was filed, and each is herein more particularly described. The insurer made a loan against each which is unpaid. The bill prays for a judgment declaring the status of the policies, which in effect is a declaration of the state of Edwin P. Haworth's health. The district court sustained defendants' motion to dismiss the bill on August 22, 1935, and filed an opinion (Rec. 80, 81-84). The petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit which affirmed the decree on July 27, 1936 (Rec. 105). Writ of certiorari was granted herein November 16, 1936 (Rec. 107).

Policy No. 425229 was written June 1, 1911, in the principal amount of $10,000.00 (Rec. 2). The assured pledged this policy for a loan of $3,827.00, which with accrued indebtedness formed a total sum of $4,011.97 upon the first day of June, 1934 (Rec. 5). The policy provides (Rec. 3) that in event of the assured becoming wholly, continuously and permanently disabled as therein described, then in lieu of all other values, benefits, or privileges therein provided, without further payment of premium, all premiums previously due having been paid, the insurer would pay in full settlement, upon request of the life beneficiary and assignee, one-twentieth of the sum insured, and dividend additions, if any, and would pay the same amount annually thereafter until twenty such payments in all had been made, or would pay the amount

of annuity shown by a table of annuities therein contained, for the age of the insured at the last birthday preceding the receipt of such proof, and the same amount annually thereafter during the lifetime of the insured, provided that at every such annuity payment satisfactory proof were furnished that the insured was then living, any indebtedness to the insurer on account of said policy to reduce the amount of either of said annual payments in the same proportion that said indebtedness might bear to three-fourths of the sum insured and dividend additions, if any.

Under these provisions and the situation as alleged the amount payable to the assured for disability on the annuity basis would be $506.93 annually, beginning May 28, 1934, and on the twenty payment basis described in the petition the amount payable to the insured for disability would be approximately $267.46 annually, beginning on the same date. The amount due upon this policy at the time the petition was filed, therefore, in no event could be more than $338.00.

Policy No. 537284 was written November 9, 1921, in the principal amount of $5,000.00 (Rec. 7). The assured pledged it for a loan of $825.00 (Rec. 9). The policy provides (Rec. 8) that in event the insured should become wholly, continuously, and permanently disabled and would for life be unable to perform any work or conduct any business for compensation or profit, and satisfactory evidence of such disability were received at the home office of the insurer before the sum insured, or any installment thereof, became payable, the insurer would, upon the acceptance of such proof, if all premiums

previously due had been paid, waive the payment of all premiums falling due thereafter during such disability, and that if such disability existed before the insured attained the age of sixty years, the insurer would immediately pay to the life beneficiary the sum of ten dollars for each thousand dollars of the sum insured and would pay the same sum on the same day of every month thereafter during the lifetime and during such disability of the insured.

The policy further provides (Rec. 43) that if the insured recovers from the permanent total disability above described, the benefits herein provided will immediately cease and the policy will continue as if no disability had been incurred if the premiums falling due after such recovery are paid when due.

The petition, filed January 5, 1935 (Rec. 1), lays the date from which it asks disability to be determined as November 9, 1931 (Rec. 9). In the situation as alleged, the amount payable to the insured for disability at the time the petition was filed in no event could be more than $1,950.00.

Policy No. N 760251 was written October 9, 1929, in the principal amount of $10,000.00 (Rec. 10). Policy No. N 808571 was written September 9, 1929, in the principal amount of $10,000.00 (Rec. 13); and policy No. N 808572 was written October 9, 1929, in the principal sum of $5,000.00 (Rec. 16). Each is payable immediately upon receipt at petitioner's home office of due proof of the death of the insured, to the beneficiary therein named, Cora M. Haworth, respondent herein, and wife of the insured. Neither contains any provision for pay-

ment of benefits by reason of or on account of the insured's disability, or any acceleration of payment thereby. Each contains a provision described in the petition (Rec. 11, 14-15, 17) as being contained in a rider, that if, before default in payment of premium and before attaining the age of sixty years, the insured should become totally and permanently disabled by bodily injuries or disease, and were thereby prevented from performing any work or conducting any business for compensation or profit, the insurer would waive the payment of premiums falling due during such disability, it being provided therein that such disability should be presumed to be permanent if existing for a period of ninety consecutive days, if satisfactory evidence had not been previously furnished that such disability were permanent, and that, in the absence of the furnishing of such evidence, the benefit should accrue from the expiration of the said ninety days, but not from a date more than six months prior to the date that evidence of such disability satisfactory to the insurer should be received at its home office, it being further provided that no benefit should accrue prior to the expiration of said ninety days unless during that period evidence satisfactory to the insurer should be received at its home office, during the life of the insured, that the total disability would be permanent, in which event the benefit would accrue from the commencement of disability.

The rider described in the petition as being in each of the said three policies contains the following (policy No. N 760251, Rec. 53; policy No. N 808571, Rec. 63; policy No. N 808572, Rec. 73):

"The benefit under this provision is conditioned upon evidence of the continuance of total disability of the insured satisfactory to the company being furnished when requested and upon the representative of the company being permitted to examine the insured at any time, but such evidence or examination shall not be required oftener than once a year after the expiration of two years from the acceptance of such evidence. If it shall appear to the company that the insured is able to perform any work or conduct any business for compensation or profit after a claim has been allowed, then, except in case of the irrecoverable loss of the entire sight of both eyes or the irrecoverable total and permanent loss of the use of both hands or of both feet, or such loss of one hand and one foot, the disability benefit shall cease."

Petitioner's petition or bill covers 25 pages of the printed record (Rec. 1-25). When its verbiage is reduced into its simple essence it is a request, or as petitioner construes it, a demand that the district court determine now Edwin P. Haworth's state of health at the time named in the petition. It does not aver that if as a fact Edwin P. Haworth be disabled so as to entitle him to disability benefit provisions of the policies, either he or Cora M. Haworth is now entitled to sue upon them or has a present cause of action, or that either would now be entitled to a final judgment of any kind in a proceeding of any kind. It does not aver that if as a fact he be disabled now either he or his wife would be entitled to recover in event of his death at some future time. It presents nothing for determination but the simple fact of Edwin P. Haworth's present and past disability.

## SUMMARY OF ARGUMENT.

### I.

### The Petition Does Not Present an Actual or Justiciable Controversy.

The declaratory judgment act does not change the essential requisites for the exercise of judicial power. Nor does it for the purposes of the act make that a controversy which before its enactment was not a controversy in the constitutional sense.

*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288.

Opinion District Court Sustaining Motion to Dismiss (Rec. 83).

Opinion United States Circuit Court of Appeals (Rec. 94, 96-97).

a. The solution will be found by a practical application of legal principles to the particular case presented by the petition rather than by text-book abstractions and academic refinements of a general nature. An analysis of the case is therefore presented.

The petitioner asks the court to determine a fact, the only value of which determination would be that it could be employed by the petitioner as a defense in the event of a future suit on any of the policies.

When the petition was filed herein there was no present right of recovery of an amount sufficient to give a federal court jurisdiction. The petition, therefore, does not present a case or controversy between the parties as to the right

of either to a money judgment against the other in a federal court. The controversy cognizable here, if any there be, must, therefore, be about something other than a present right to a judgment for money.

The petitioner says its petition presents a controversy of fact, the adjudication of which in its favor will be a good defense to a possible future suit upon policies written in the face amount of more than $3,000.00. It argues therefrom that the determination of such fact would be a declaration of rights or legal relations involving the jurisdictional amount.

The respondents say no controversy in the constitutional sense is presented.

b. A dispute out of court about the present existence of a mutable fact, which may become an element in the determination of an action at law that may be commenced at some future time, is not a controversy in the sense in which that word is used in the Constitution.

*Piedmont & Northern Ry. Co. et al.* v. *United States et al.*, 280 U. S. 469.

*Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249.

*Fidelity National Bank* v. *Swope*, 274 U. S. 123.

*Willing* v. *Chicago Auditorium Association*, 277 U. S. 274.

Opinion United States Circuit Court of Appeals (Rec. 97).

*Arizona* v. *California*, 283 U. S. 423.

*Alabama* v. *Arizona*, 291 U. S. 286.

*United States* v. *West Virginia*, 295 U. S. 463.

*New Jersey* v. *Sargent*, 269 U. S. 328.

*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

## II.

### The Petition Does Not Present a Controversy Which the District Court, by Mandate of the Federal Declaratory Judgment Act, Must Determine.

It is generally recognized that declaratory judgments are not applicable to every difference, or to every controversy that may arise between prospective litigants. In all jurisdictions it has been declared that the court has a discretion in determining whether under the law it should declare a judgment at all in any particular case.

*Newsum et al.* v. *Interstate Realty Co. et al.*, 152 Tenn. 302, 278 S. W. 56.

Freeman on Judgments, Vol. 3 (5th Ed.), Par. 1356.

*Ziegler* v. *Pickett*, 46 Wyo. 283, 25 Pac. (2d) 391.

Opinion of District Court Sustaining Motion to Dismiss (Rec. 81).

## III.

### The Court Did Not Abuse Its Discretion in Dismissing the Petition in This Case.

The purpose of the proceeding is not to settle any present "rights or other legal relations," but to settle one particular fact that may later be called into question in a possible suit. The dispute is not even as to a completed fact capable of exact and final ascertainment, but as to a fact probably changing and resting somewhat in opinion. If the insured should now establish the questioned fact, he would not be entitled to a present judgment against the insurance company; it would not determine finally his right to a judgment in a future action; the adjudication would not be susceptible of violation and could not

call for enforcement; it would not finally adjudicate the standing of the parties.

The declaratory procedure is inappropriate to a judicial investigation of disputed facts, or to an inquiry where, as here, if the decision should go in one way it might involve further litigation, or to an inquiry, as here, that would not necessarily lead to a final determination of the right of one litigant to recover against the other, and the discretion of the court to refuse to declare a judgment in such cases is generally recognized.

The petition or bill was properly dismissed in this case.

*Lewis* v. *Green*, Law Reports (1505), II Ch. Div. 340.

*Ziegler* v. *Pickett*, 46 Wyo. 283, 25 Pac. (2d) 391.

Rules of the Supreme Court, England, Order LIV. A.

*Newsum et al.* v. *Interstate Realty Co. et al.*, 152 Tenn. 302, 278 S. W. 56.

Freeman on Judgments, Vol. 3 (5th Ed.), Par. 1356.

*Ladner et al.* v. *Siegel et al.*, 294 Pa. 368, 144 Atl. 274.

*Washington Detroit Theater Co.* v. *Moore*, 249 Mich. 673, 229 N. W. 618.

Legal Periodical Digest, p. 5073.

41 Yale Law Journal, June, 1932, pp. 1195-1212.

45 Harvard Law Review, p. 1089.

## ARGUMENT.

Three questions are presented here for determination.

1. Do the facts stated in the petition present an "actual" or justiciable "controversy," in the constitutional sense, between the plaintiff and the defendants which the federal district court may determine?

2. Do they present an "actual" or justiciable "controversy" which the court, by mandate of the Federal Declaratory Judgment Act of June 14, 1934, must determine, without power to dismiss the petition if it finds, in the court's judicial discretion, that the petition does not present such a case as under the law it ought to try in the peculiar manner of a proceeding for a declaratory judgment?

3. Did the court abuse its judicial discretion in dismissing the petition in this particular case?

### I.

### The Petition Does Not Present An Actual or Justiciable Controversy.

We will begin with the premise that the declaratory judgment act does not change the essential requisites for the exercise of judicial power. Nor does it for the purposes of the act make that a controversy which before its enactment was not a controversy in the constitutional sense.

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, l. c. 325, this court said:

> "The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms it applies to 'cases of actual controversy,' a phrase which must be taken to denote a controversy of a justiciable nature, * * *."

Again this court there said, l. c. 324:

> "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining."

We respectfully submit that the district court and the circuit court of appeals reached proper conclusions in this case.

In his Opinion of District Court Sustaining Motion to Dismiss, in this case (Rec. 83), Judge Otis said:

> "The real question here is whether the case stated by the petition is within the legitimate scope of the Declaratory Judgments Act. Does it present a present controversy in the constitutional sense between the plaintiff and defendants—'an adversary proceeding, involving a real, not a hypothetical, controversy,' and is the judgment sought a judgment finally determinative of that controversy? *Nashville, etc., Ry. Co.* v. *Wallace, supra.* If an actual controversy in such a sense is presented has the plaintiff, with respect to that controversy, any present 'rights or other legal relations' to be declared?
>
> "It is my view that both these questions must be answered in the negative."

Judge Thomas, in the opinion of the United States Circuit Court of Appeals in this case (Rec. 94, 96-97), said:

> "The apprehension of the plaintiff is that suit will be brought against it at some time prior to the running of the statute of limitations.
>
> "Apparently the sole object of this proceeding is to furnish plaintiff an opportunity to establish now its alleged defense to such anticipated litigation, because no claim is made to any contractual rights resulting from the purported wrongful non-payment of premiums. Assuming that insured has defaulted, as alleged, the plaintiff in such case is entitled to only one of two rights. First, it may rely on the contract and assert its right to damages or to specific performance; or, second, it may cancel or rescind the contract. In the present proceeding it seeks the equivalent of cancellation and makes no claim to the first right. The right of cancellation is one which the plaintiff may exercise itself without asking the aid of the court. The only advantage to be derived from a declaratory judgment is an adjudication of the right of cancellation, and the only value of such an adjudication is that it will be a defense in the event of a future suit on the policies. The only disadvantages alleged to result from the present status are the danger of loss of evidence and the setting aside of reserves."

a.

We believe the solution of this matter will be found by practical application of legal principles to the particular case presented by the petition rather than by text-book abstractions and academic refinements of a general nature. We believe, therefore, the following analysis will be clarifying.

In its last analysis the object of the petitioner in filing the original petition in this proceeding was to obtain from the district court a finding of a particular fact, the existence or truth of which the petitioner denies. As a practical matter the petitioner seeks to cast upon the respondents the positive burden of establishing it by evidence as against petitioner's mere negative assertion that such fact does not exist. Scrutiny of that petition discloses no statement, allegation or admission that if the district court should find that the respondents have established that fact either respondent would be entitled now or in the future to recover upon the policies described.

The fact the petitioner asks the court to determine is that Edwin P. Haworth has not suffered a disability of such a character and for such time as would entitle him to a waiver of the payment of such premiums of certain insurance policies as became due and remained unpaid at the time this proceeding was commenced. The only value of such a determination would be that it could be employed by the petitioner as a defense in the event of a future suit on any of the policies.

The fact sought to be determined is a changeable condition—the state of insured's health. Neither of the policies numbered N 760251 (Rec. 46), N 80571 (Rec. 57) and N 80572 (Rec. 67) confers any present right to sue on account of or by reason of insured's disability. The disability benefit under each is that the insurer will waive premium payments falling due during the disability. Each provides that such benefits shall be conditioned upon evidence of the continuance of total dis-

ability. The insured might be disabled now, and be proved to be so, and yet unless he should continue disabled until his death, or recover and pay premiums until his death, his beneficiary would never have a cause of action upon the policies. If the question of fact which the petitioner asks the court to find should be determined against its contention and in favor of the respondents, such determination, even if later it could be used in suits upon these policies as an adjudication of that fact, would not serve to establish a cause of action upon any of them.

The other two policies mentioned in the petition are numbered 425229 and 537284, respectively. It appears from respondents' statement herein that when the petition was filed there was no present right of recovery of as much as three thousand dollars on either of them. It is not alleged nor asserted that upon any policy, or upon all of them, under any possible finding of fact, either respondent was when the petition was filed, entitled to recover as much as three thousand dollars. It is manifest, therefore, that a federal court has no jurisdiction of the subject matter by reason of any amount presently recoverable. The respondents could not have maintained a suit in the federal court for a judgment on any of the policies. Only by living and permitting installments to remain long overdue would the insured ever be entitled to sue in the federal court for benefits accruing by reason of his disability.

It would seem clear that looking at the matter from the standpoint of the respondents, the insured and his wife as beneficiary, the petition filed in the district court

does not present an actual justiciable case or controversy, in the constitutional sense, cognizable in a federal court.

At most the respondents could now establish a mutable fact which, if the condition of the insured should not improve, might help his beneficiary to establish a complete case at some time in the future.

Petitioner's counsel say the insurer has asserted a cancellation and that insured has a right to sue in equity to set it aside. If such assertion was made before this suit was commenced it was done entirely out of court by petitioner's own declaration and not otherwise. Why should the insured sue to set aside such a cancellation when the same question could be raised by the insurer at every premium-paying period or maturity until the assured's death?

The petitioner, however, insists that looking at the matter from its standpoint the petition does present an actual justiciable case or controversy.

Obviously when this petition was filed there was not, and could not be, any case or controversy between the parties as to the right of either to a money judgment against the other in a federal court. The controversy cognizable here, if any there be, must, therefore, be about something other than a present right to a judgment for money.

None of the policies numbered N 760251 (Rec. 46), N 808571 (Rec. 57), and N 808572 (Rec. 67) contains any provision for payment of benefits by reason of or on account of insured's disability. Each provides that if

before default in payment of premium and before attaining the age of sixty years, the insured shall become totally and permanently disabled by bodily injury or disease, and is thereby prevented from performing any work or conducting any business for compensation or profit, the insurer will waive the payment of premiums falling due during such disability. Each provides that the benefit under this provision shall be conditioned upon evidence of the continuance of total disability, and that if it should appear that the insured is able to perform any work or conduct any business for profit after a claim has been allowed, then except in the case of the irrevocable loss of the entire sight of both eyes, or the irrevocable total and permanent loss of the use of both hands, etc., the disability benefit shall cease (Rec. 53, 63, 73). Neither Edwin P. Haworth, whose life is insured, nor Cora M. Haworth, the named beneficiary, is asserting any present right to recover upon any of these policies.

Each of these policies recites that it is made in consideration of a specified annual premium, and provides that if such premium is not paid when due, the policy shall cease, subject to a grace and to certain values and privileges therein described. The insured, relying upon his disability, and upon the disability provisions of his policies, ceased paying premiums.

The petitioner prays that the court render a declaratory decree or judgment, declaring that each of the policies described in the petition is null and void and that each of them has lapsed because of nonpayment of premiums.

The petitioner says that the real purpose of the proceeding is to have an immunity declared. It says that if the facts are as it contends they are there can be no recovery against it on the policies (practically every prospective defendant to a possible lawsuit says the same); that some day it may be sued; that it gathers an intention to sue from respondents' conduct. It says that if this question of fact should be adjudicated in its favor the conclusion must follow that it is not now obligated, and it asks the district court to find the facts in its favor and preserve the adjudication so that, if need be, it can be taken from the judicial shelf and be used as a defense in possible subsequent actual litigation. It refers the court to the declaratory judgment act for its authority so to do.

If the act be given such effect it will be a startling departure from anything heretofore known in our jurisprudence. We are familiar with proceedings to perpetuate testimony, but this is something different in character. Testimony has long been perpetuated by reducing it to writing and preserving it for future reading. Here it is sought to arrive at a judicial determination of a fact from testimony and to preserve the determination in somewhat the manner the testimony of witnesses has been preserved.

Petitioner says that if this question of fact be determined in its favor that adjudication will be a good defense to a future suit on the policies, and that since it has a good defense the relation of insurer and insured does not exist between it and the respondents. It argues

therefrom that the determination of such fact is a declaration of "rights" or "legal relations."

There is no uniqueness in petitioner's position. The relation of debtor and creditor would be involved whenever one asserted another owed him a debt and that other denied it. The relation of tort-feasor would be involved whenever one claimed to have been injured by the act of another and that other denied it. Under this theory it is difficult to imagine a possible or prospective lawsuit where some fact would not be subject to a declaratory judgment.

b.

We submit that a dispute out of court about the present existence of a mutable fact which may become an element in the determination of an action at law that may be commenced at some future time is not a controversy in the sense in which that word is used in the constitution.

In *Piedmont & Northern Ry. Co. et al.* v. *United States et al.*, 280 U. S. 469, the effect of what the plaintiff really asked was that the court determine as a matter of fact whether certain proposed extensions would be "street, suburban, or interurban electric railways, etc." That case was decided before the enactment of the declaratory judgment act. A carrier by railroad subject to the interstate commerce act, operated in interstate commerce about 128 miles of line in North and South Carolina, using exclusively electric locomotives. It determined to extend its lines 53 miles on one route and 75

miles on another, in order to connect with several steam railroads. The interstate commerce act prohibits any carrier by railroad subject to the act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. It provides for applications for certificates and prescribes the procedure and mode of disposal. Paragraph 22 exempts from the scope of those provisions the construction of industrial and certain other tracks "located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Believing that the above provisions of the act were inapplicable, the railway company intended to make the proposed extensions without securing from the commission a certificate of public necessity and convenience. There was, however, a proceeding in which the commission denied its right to a certificate.

It brought a suit against the United States in the federal court, the general purpose of which was to set aside the order of the Interstate Commerce Commission to the effect that it was not entitled to a certificate of public necessity and convenience. The ground of its suit was that what it intended to do did not bring it within the provisions of the act. The effect of what the plaintiff really asked was that the court determine that the proposed extensions came within the exemption of Paragraph 22. That is, to determine as a matter of fact, so far as the extensions were concerned, whether they would

be 'street, suburban, or interurban electric railways, which were not operated as a part or parts of a general steam railroad system of transportation.'' The court said, l. c. 477:

> ''The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the commission jurisdiction over the railway's application, then concededly the order is not subject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the railway's plans. What plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the railway is within the exemption contained in Paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts.''

*Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, was decided by this court before the enactment of the Federal Declaratory Judgment Act. It involved the application of the Tennessee Declaratory Judgment Act. This court, in ordering the cause set down for argument, invited the attention of counsel to the question ''whether a case or controversy is presented in view of the nature of the proceedings in the state court.'' The court said, l. c. 259:

> ''This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this court is invested by Art. III, Par. 1 of the Constitution, extends by Art. III, Par. 2, only to 'cases' and 'controversies'; if no 'case' or 'controversy' is presented for decision, we are without power to review the decree of the court below.''

The railway company filed its bill of complaint in the state chancery court, joining as defendants the attorney general and the state officials charged with the duty of collecting the gasoline privilege tax imposed by the Tennessee statute. The complaint charged that the defendants assert that the statute taxes the privilege of storing gasoline within the state and is applicable to complainant; that they have demanded payment of the tax in a specified amount and have determined to enforce their demand and that, under the circumstances alleged, the statute as applied to complainant is invalid under the commerce clause and the Fourteenth Amendment. The relief prayed was that the taxing act be declared unconstitutional as applied to complainant. A demurrer was sustained to the sufficiency in law of the allegations relied on to establish the unconstitutionality of the tax. The decree was affirmed by the highest court of the state.

This court, declaring that the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax, said that "the narrow question presented for determination is whether the controversy before us, which would be justiciable in this court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax."

This case lacks the essentials which this court enumerated and was careful to state existed in the situation

brought before it in *Nashville, C. & St. L. Ry. Co.* v. *Wallace.*

There this court was careful to note (l. c. 260) the provision of the Tennessee statute that the court might refuse to render a declaratory judgment where, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding." As we have seen, a declaratory judgment could not terminate the uncertainty and the controversy which appellant alleges as the ground of its complaint. If Edwin P. Haworth should in this proceeding be declared to be disabled now, and should die, in a long or short time, the beneficiary of the policies would still face a controversy as to whether the disability continued after another premium maturity.

Another feature the court evidently considered essential (l. c. 260) is that the provisions of the Tennessee statute might only be invoked when the complainant asserts rights which are challenged by the defendant. In the case at bar the petition describes neither a right in plaintiff nor an invasion by the defendant. Appellant merely says that if a particular fact be found to exist now and shall continue without a change to which it is subject it may at some time in the future be sued—sued successfully. It asks that as a starting point for a piecemeal determination the present status of a changeable fact be determined. We cannot follow the argument that the petition here asserts a right which is challenged by the defendant.

Another feature stressed by the court in *Nashville, C. & St. L. Ry. Co.* v. *Wallace* was (l. c. 261-262) that valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees would be directly affected to a specific and substantial degree by the decision of a question of law. The question appellant seeks to present for determination here is purely one of fact. No question of law is presented.

Another feature stressed there (l. c. 262) is that the question presented lends itself to judicial determination and is of the kind which the Supreme Court traditionally decides, and that the relief sought is a definitive adjudication of a disputed constitutional right of the appellant (the plaintiff). The court (l. c. 264) said: "The issues raised here are the same as those which under old forms of procedure could be raised only in suit for an injunction or one to recover the tax after its payment. But the constitution does not require the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies." If our federal courts traditionally have judicially determined a question of changeable fact in a case which involves the issues of an action at law, before any action is brought, we are not familiar with the tradition.

In *Fidelity National Bank* v. *Swope*, 274 U. S. 123, l. c. 131, in holding that a case or controversy was presented this court said:

> "Under this procedure, the judgment to be awarded finally determines, subject to appeal, the

validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens."

Obviously under that ruling a decision which could be final only as to one party, and might not be final as to the other, does not meet the requirements of finality.

In *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, decided before the Federal Declaratory Judgment Act was adopted, the Auditorium Association had constructed an expensive commercial building on ground leased to it for long terms. Finding the income inadequate to pay profits on the investment, and desiring to substitute on the same ground a larger building of modern type, but fearing that under the terms of the leases it could not remove the existing structure without the lessors' consent, it brought a suit for the purpose of establishing its right to do so, praying also that the defendants be restrained from taking any steps to prevent such removal. Mr. Justice Brandeis said, l. c. 288:

"Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong, either at law or in equity."

Just as obviously, submission by the insured to the insurer of proof that his condition is such as to disable him, is, although the insurer may disagree with him, not an actionable wrong either at law or in equity.

Again this court there said:

"But still the proceeding is not a case or controversy within the meaning of Article III of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter."

The circuit court of appeals properly disposed of the question of reserves when Judge Thomas said (Rec. 98-99):

"Second, the plaintiff insists that it is injured and its rights are prejudicially affected by reason of the fact that it is required annually to set aside substantial reserves for each of the policies in question until it is judicially determined that they have lapsed and are null and void. This claim is without merit for two reasons. First, if it be true that reserves must be set aside as alleged, it is not shown that this is the result of any of the acts attributed to the defendants; and, second, the plaintiff is not thereby deprived of any property right. The funds called reserves continue to be the plaintiff's property, and its control over such funds is neither modified nor affected by the notices served upon it by defendants. The claim of plaintiff in this regard is analogous to the claim asserted by the State of New Jersey in the *Sargent Case, supra,* and disposed of by the Supreme Court in the following language:

'As respects the State's submerged lands, the bill signally fails to disclose any existing controversy within the range of the judicial power. Stating merely that the State will be deprived of revenue from the leasing of such lands

> is not enough. Facts must be stated showing that the act is being or about to be applied in a way which does or will encroach on or prejudicially affect the State's qualified right in the lands.'

"The same rule was stated with equal emphasis by the Supreme Court in the *Ashwander Case, supra,* wherein it is said:

> 'The pronouncements policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining.' "

The setting up of reserves does not create present rights or other legal relations between the petitioner and the respondents. Every obligor and debtor is faced with the problem of maintaining an ability to pay when payment shall be required. On the theory advanced by petitioner every debtor or obligor who questions his obligation would be entitled to maintain a suit for a declaratory judgment to determine whether he must maintain himself in a position to pay if and when called upon. Petitioner can claim no substantial uniqueness in its situation.

Nor is the amount of the reserves a proper measure of the amount in controversy. One who is sued for $3,000.00 would not be heard to say that because he must maintain $3,500.00 in liquid assets to assure his ability to pay in event judgment should go against him the amount involved is $3,500.00 and not $3,000.00. No more

can petitioner be heard to say that the amount of its reserves upon a policy determines the amount involved in a suit upon it.

We respectfully submit that the United States Circuit Court of Appeals, in its opinion (Rec. 97), properly said:

> "We are impressed that the situation thus presented by the petition amounts to no more than an 'assumed potential invasion' of plaintiff's rights, and that it does not for this reason present a justiciable controversy. *Arizona* v. *California*, 283 U. S. 423, 462. The judicial power of the federal courts does not extend to the giving of mere advisory opinions or the determination of abstract propositions. *Alabama* v. *Arizona*, 291 U. S. 286, 291; *United States* v. *West Virginia*, 295 U. S. 463, 474; *New Jersey* v. *Sargent*, 269 U. S. 328, 338. To present an 'actual controversy' within the constitutional meaning of that phrase there must be a statement of facts showing that the defendant is acting or is threatening to act in such a way as to invade, or prejudicially affect, the rights of the plaintiff. *New Jersey* v. *Sargent*, *supra*. The declaratory judgment act does not change the essential requisites for the exercise of judicial power nor alter the character of controversies which are the subject of judicial power under the constitution. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325; *United States* v. *West Virginia*, 295 U. S. 463, 475."

## II.

### The Petition Does Not Present a Controversy Which the District Court, by Mandate of the Federal Declaratory Judgment Act, Must Determine.

Petitioner's argument proceeds upon the theory that in every case of actual controversy that involves rights

and other legal relations the district court *must* entertain a petition or bill in equity filed by any interested party for a declaratory judgment. That would mean that any interested party to any controversy would have an absolute right to have his case tried by the declaratory judgment procedure provided by the statute. That would mean that the Congress has said peremptorily to the courts that they must try in that manner every actual controversy presented by such a petition.

We cannot believe that the Congress intended to work such a change in judicial procedure and practice and leave the courts no discretion in the matter. The proper way for the court to exercise that discretion is either to entertain the bill and hear the evidence or dismiss the bill on its face. If it believes the bill does not present such a case as under the law it ought to try in the peculiar manner of a proceeding for a declaratory judgment, it has a judicial right to dismiss the bill which the Congress cannot take away from it. The appellate court may inquire whether the trial court has abused that judicial right, but the Congress cannot take it from the courts.

Many states have authorized declaratory judgments by statutes which have been upheld in principle by their courts. It is generally recognized that such statutes are not applicable to every difference that may arise beween prospective litigants. In all jurisdictions it has been declared that the court has a discretion in determining whether under the law it should declare a judgment at all in any particular case.

In *Newsum et al.* v. *Interstate Realty Co. et al.*, 152 Tenn. 302, 278 S. W. 56, the Supreme Court of Tennessee, holding that the case before it was not a proper one for a declaratory judgment, said:

> "Recognizing that the courts have a very wide discretion under these acts, which should be exercised with the utmost caution, it has been said by good authority that 'a declaration may properly be refused if it can be made only after a judicial investigation of disputed facts.' Freeman on Judgments, Vol. 3 (5th Ed.), Par. 1356."

In *Ziegler* v. *Pickett*, 46 Wyo. 283, 25 Pac. (2d) 391, the court exercised judicial discretion. A grocer sought a judgment declaring whether or not a provision of a statute under which he was licensed that forbade his advertising for sale certain beverages which he was licensed to sell, were valid. The ground of the challenge was that the provision forbidding advertising was not expressed in the title of the act. The court said:

> "If we answer that the provision forbidding advertising is expressed in the title of the act, it would still be open to the plaintiff, or to others similarly situated, to contend that the regulation is void on some ground not now pressed."

Then the court said:

> "If we answer that the provision forbidding advertising is not expressed in the title of the act, plaintiff's rights as a licensee would still be uncertain."

The court concludes:

> "In these circumstances we think a proper exercise of judicial discretion requires the refusal to

render a declaratory judgment, and the reserved question need not be answered."

The exercise of this discretion by dismissing the bill and refusing to declare a judgment as demanded is the manner of deciding the matter prescribed by Equity Rule 29. The alternative would be to require the court to hear the evidence and then find from it that the case was of such a nature that the court would in its judicial discretion refuse to declare a judgment, a conclusion which it could reach from examination of the bill itself. The act of Congress undertakes to confer upon the courts of the United States the "power" upon appropriate pleading to declare rights and other legal relations of any interested party, etc. The Congress has not undertaken to deprive the courts of judicial discretion in the manner in which that power shall be exercised, or of their power to refuse to exercise it in cases to which they deem it inappropriate.

If this law shall be held to be valid, and if it shall be construed as respondent is asking this court to construe it, the procedure and practice in the federal courts will be revolutionized in a manner neither intended nor foreseen by the Congress.

In his Opinion of District Court Sustaining Motion to Dismiss, in this case (Rec. 81), Judge Otis said:

> "If the company can seek such a declaratory judgment then any person who has entered into a contract with another and who fears he may be sued by that other for breach of contract may proceed, as does the plaintiff here, in advance of the institution of that suit, to have determined an issue of

fact which that suit will present. Certainly in the enactment of this statute the Congress contemplated no such radical departure in our jurisprudence from the old procedure."

## III.

### The Court Did Not Abuse Its Discretion in Dismissing the Petition in This Case.

The inappropriateness of declaratory procedure to a judicial investigation of disputed facts, or to an inquiry where if the decision should go in one way it might involve further litigation, or to an inquiry that would not necessarily lead to a final determination of the right of one litigant to recover against the other, and the discretion of the court to refuse to declare a judgment in such cases is ably discussed in *Lewis* v. *Green*, Law Reports (1905), II Ch. Div. 340. That case is cited in *Ziegler* v. *Pickett, supra*, 46 Wyo. 283, 25 Pac. (2d) 391. It arose in England under the Rules of the Supreme Court, Order LIV. A, which apparently had the force there of the statutory act here. It provided: "In any division of the high court, any person claiming to be interested under a deed will or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." And "The court or judge shall not be bound to determine any such question of construction if in their opinion it ought not to be determined on originating summons." The court holding that in any case it could not under the rule determine complicated facts—in that instance an accounting—said:

"Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted."

The court in holding that the procedure is only intended to enable the court to decide questions where decisions of those questions, whichever way it may go, will settle the litigation between the parties, said:

"It seems to me that under such circumstances as those under which this summons was issued, Order LIV. A is not the appropriate mode of procedure. The result will be this: the court may, after considerable litigation, involving an argument in a court of first instance, an argument in the court of appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the question of construction raised by this summons the applicant is right. Well, what then? No relief can be given on that. There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong. The respondent will have had to pay all of the expense of the litigation on the question of construction, which will be utterly useless. It seems to me that where one finds circumstances such as I find here, the procedure under Order LIV. A is improper. It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncer-

tain what may be the ultimate decision on the point of construction, and where if the decision is in one way it involves further litigation."

The order there considered speaks of a question of construction, while the statute here speaks of "rights and other legal relations," but that does not alter the reasoning. Where the court there said of the order: "It is only intended to enable the court to decide questions of construction where the decisions of those questions, whichever way it may go, will settle the litigation between the parties," it might just as well be said of the statute here: It is only intended to enable the court to decide rights and other legal relations where the decision of them, whichever way it may go, will settle the litigation between the parties."

The order there expressly stated that the court or judge should not be bound to determine any such question if in their opinion it ought not to be determined on originating summons. Under our constitution the court has such discretion without a gift of it by the Congress and the Congress could not, if it wanted to, take it from the court.

Let us illustrate the soundness of the principles declared. Suppose the courts should determine in this proceeding that Mr. Haworth was disabled at the times mentioned in the bill. Upon demand by his widow for the proceeds of the policies after his death the insurance company could say to her: "We deny that Mr. Haworth's disability continued until his death. We will not pay without suit." She would still, despite the declaratory

judgment in her favor, have to sue and to cover the same ground, and almost to the same extent.

In *Newsum et al.* v. *Interstate Realty Co. et al.*, 152 Tenn. 302, 278 S. W. 56, the Supreme Court of Tennessee, holding that the complainants who, owning real estate placed it for sale with more than one agency, each of which claimed a commission for a sale, were, under a bill which asked relief in interpleader, and, in the alternative, for a declaratory judgment, not entitled to interplead because the defendants claimed independently of each other, and there was no specific fund at stake. In holding the case was not one for a declaratory judgment, the court said:

> "A declaratory judgment is essentially one of construction. It is apparent from the history of the legislation providing for this procedure, as well as from the recitals of the Uniform Declaratory Judgments Act itself, that its primal purpose is the construction of definitely stated rights, status, and other legal relations, commonly expressed in written instruments, although not confined thereto, and, while determination of an issue of fact is authorized by Section 9 of the Act, the settlement of disputed facts at issue between the parties will ordinarily be relegated to the proper jurisdictional forums otherwise provided. Recognizing that the courts have a very wide discretion under these acts, which should be exercised with the utmost caution, it has been said by good authority that 'a declaration may properly be refused if it can be made only after a judicial investigation of disputed facts.' Freeman on Judgments, Vol. 3 (5th Ed.), Par. 1356."

*Ladner et al.* v. *Siegel et al.*, 294 Pa. 368, 144 Atl. 274, was based upon the Declaratory Judgment Act of

Pennsylvania. In its discussion of the application of the act the Supreme Court of that state said "nor will the court prejudge a case which possibly may arise," and: "Ordinarily, it will not act where there is a dispute as to facts, or such controversy may arise."

In *Washington Detroit Theater Co.* v. *Moore*, 249 Mich. 673, 229 N. W. 618, the Supreme Court of Michigan said:

> "6. Ordinarily the court will refuse a declaration which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action."

In Legal Periodical Digest, p. 5073, is a digest of a comment on declaratory judgments in federal courts, which appeared in 41 Yale Law Journal, June, 1932, pp. 1195-1212. It evidently is written in reply to a comment published in 45 Harvard Law Review, at page 1089, in which was formulated a series of arguments designed to indicate that the declaratory judgment, however well it may function in state courts, is not well adapted to federal practice. We quote from the digest of the Yale Law Journal comment as follows:

> "By experience, declaratory actions have proved most congenial to rulings of law on more or less undisputed facts and the complete discretion of the court over declaratory relief would enable it to decline to pass upon complicated or disputed facts by declaration. * * * An examination of the state cases in which statutes and ordinances have been reviewed for constitutionality or construction discloses that almost without exception they involved issues of law without any dispute as to the facts."

This proceeding at bar is brought for the sole purpose of deciding a dispute over which there would undoubtedly be much conflict of testimony, namely, the present and past condition of health of Edwin P. Haworth.

**Conclusion.**

We respectfully submit that no chancellor could find it in his judicial conscience to put upon the insured respondent and his wife the hardship which the sustaining of this petitioner insurance company's bill—a bill in equity—would impose upon them. If in this proceeding the court should declare Mr. Haworth disabled, that would not end the matter. After the expense of a trial he would be left with only the first hurdle cleared. If after a while he should die his wife would still have before her the burden of proving that his disability established in this proceeding had continued until his death. If he should live through a span of years he might be called upon time after time to respond in the same kind of proceeding to determine whether his disability continued. He might in time become so exhausted that he could no longer maintain the fight, and his case would be lost by default. If he should die in a shorter time his wife would not find the question of her insurance settled by this proceeding. The proof required of her in a suit on the policies would not even be lessened, for his present condition though determined here would have to be shown as a basis for comparison in determining whether since this time he had recovered from his

adjudged disability to such an extent that the company would not be liable.

Petitioner argues that denial by the insurance company of the fact of the insured's disability creates a controversy. We respectfully submit that to say a controversy that could in this proceeding be ended only by a finding for the petitioner and would just be begun by a finding for the respondents is a controversy within the meaning of the statute and of the constitution would be at variance with everything this court has ever said upon the subject.

We further submit that the petitioner has no "present rights or other legal relations" to be declared.

We respectfully submit that the judgment of the United States Circuit Court of Appeals affirming the judgment of the district court dismissing petitioner's bill should be affirmed.

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